NO. 49454-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CLINTON FRYER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 16-1-00643-6

BRIEF OF RESPONDENT

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Table of Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court exceed its statutory authority when it correctly imposed a $2,895.50 fine, $200 court cost fee, and $500 crime victim penalty assessment in the judgment for count II (Driving under the Influence) entered August 22, 2016?

2. Should the judgments for counts III and IV (Ignition Interlock and DWLS 3), entered August 22, 2016, and for counts I and V (Failure to Obey an Officer and Reckless Driving), entered September 20, 2016, be remanded for correction when it is at least ambiguous as to whether the court erroneously duplicated fines imposed on count II?

B. STATEMENT OF THE CASE.

1. Procedure

On February 16, 2016, defendant was charged with Attempting to Elude a Pursuing Police Vehicle, Driving under the Influence of Alcohol (DUI), Failure to Have an Ignition Interlock, and Driving on a Suspended License in the Third Degree (DWLS 3). CP 1-3. Trial commenced on June

27, 2016. 6-27-16 RP 6.[1] The jury returned its verdict on June 30th finding defendant guilty on all counts. 6-30-16 RP 344-46.

On July 22, 2016, the court granted a mistrial on the grounds that the jury had inadvertently received a copy of defendant's driving record which included several DUI convictions. 7-22-16 RP 4-6, 11-12; CP 11. Trial was reset for August 15th. 7-22-16 RP 11. On August 18th the jury returned a guilty verdict on the DUI, Interlock violation, and DWLS 3. 8-18-16 RP 364-68; CP 17, 18, 20. The court declared a mistrial on the elude count because the jury could not reach a verdict. 8-18-16 RP 367.

The court sentenced defendant using one judgment and sentence form for the DUI and one judgment and sentence form for the ignition interlock and DWLS 3, both dated August 22, 2016. CP 21-29, 30-34. The court imposed a $2,895.50 fine on count II (DUI) and ordered a $500 crime victim penalty assessment and a $200 court cost fee. *Id.* The court imposed 60 days consecutive for the interlock violation (count III) and 90 days concurrent for the DWLS 3 (count IV). CP 30-31. In the judgment for those counts, the court handwrote that the imposed legal financial obligations were "concurrent to count II." CP 30-34.

On September 20, 2016, the court entered another judgment for counts I and V (Failure to Obey an Officer and Reckless Driving) pursuant

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[1] The Verbatim Reports of Proceedings are contained in fifteen volumes. Some volumes have multiple hearing dates contained within. Reference to VRPs will be by the date the testimony occurred.

to defendant's plea. CP 46-47. In that judgment, the court again entered a $500 victim penalty assessment but imposed it only on counts II, III, IV. *Id.* The court also said that "all legal financial obligations [run] concurrent to counts II, III, and IV." CP 48-50.

2. Facts

On February 14, 2016, at approximately 12:09 a.m., Trooper Robertson observed defendant driving his red Dodge Durango into oncoming traffic. 8-16-16 RP 39, 42, 46-47, 62, 153. Officer Loth also noticed defendant weaving from side to side from her vantage point behind Robertson. 8-16-16 RP 143-45. Both Robertson and Loth activated their lights and pulled over defendant. 8-16-16 RP 144-45. As Robertson and Loth approached the Durango on foot, defendant suddenly accelerated and took off at a high rate of speed. 8-16-16 RP 147. Robertson and Loth ran back to their cars and pursued defendant. *Id.*

Robertson accelerated to approximately 80 miles per hour during the chase but still could not catch up to defendant. 8-16-16 RP 45. As defendant approached some curves in the road, he lost control of his car and crashed into a fence off the shoulder. 8-16-16 RP 45-46. Defendant exited the car as Robertson approached him on foot. 8-16-16 RP 46-47. Both officers could smell alcohol on defendant's breath, but he ultimately refused to give a sample. 8-16-16 RP 62, 64-66. Defendant was eventually taken to a hospital where he drew a blood alcohol reading of .26. 8-16-16 RP 66-67, 188.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT EXCEED ITS AUTHORITY WHEN IT CORRECTLY IMPOSED A $2,895.50 FINE, $200 COURT COST FEE, AND $500 CRIME VICTIM PENALTY ASSESSMENT IN THE JUDGMENT FOR COUNT II (DUI) ENTERED AUGUST 22, 2016.

A court may impose a penalty assessment of up to $500 for each case or cause of action, including one or more convictions of a felony or gross misdemeanor, against any person found guilty in the superior court of having committed a crime. RCW 7.68.035(1)(a). "Upon conviction or plea of guilty... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars." RCW 36.18.020(2)(h). In addition, a person convicted of a gross misdemeanor is subject to a maximum fine of $5,000. RCW 9A.20.021(2). Driving under the influence is a gross misdemeanor pursuant to RCW 46.61.502(5).

Final judgments should only be vacated or altered in limited circumstances where the interests of justice most urgently require. ***State v. Smith*** 159 Wn. App. 694, 700, 247 P.3d 775 (2011). Extraordinary circumstances warranting relief from a judgment include fundamental and substantial irregularities in the court's proceedings or irregularities extraneous to the court's action. *Id* at 698.

The judgment for count II (DUI) included one $200 court cost fee, one $500 penalty assessment, and one $2,895.50 fine, all of which are valid under statute. The court clearly stated on the record that it was imposing the

mandatory minimum fine of $2,895.50 for the DUI in accordance with the DUI sentencing grid.[2] 8-22-16 RP 23-24. Because no error was made in the judgment for count II, there is no legitimate basis for vacating it; thus, the judgment for count II should not be disturbed.

2. THE JUDGMENTS FOR COUNTS III AND IV (IGNITION INTERLOCK AND DWLS 3) DATED AUGUST 22, 2016, AND FOR COUNTS I AND V (FAILURE TO OBEY AN OFFICER AND RECKLESS DRIVING) DATED SEPTEMBER 20, 2016, SHOULD BE REMANDED FOR CORRECTION BECAUSE IT IS AT LEAST AMBIGUOUS WHETHER THE COURT DUPLICATED THE FINES IMPOSED ON COUNT II.

Courts have the duty and power to correct erroneous sentences upon their discovery. ***In re Pers. Restraint of Call***, 144 Wn.2d 315, 334, 28 P.3d 709, 719 (2001). This duty persists even where the parties not only failed to object but agreed with the sentencing judge. *Id.* at Fn. 71(quoting ***State v. Loux***, 69 Wn.2d 855, 858, 420 P.2d 693 (1966) *overruled on other grounds by* ***State v. Moen***, 129 Wn.2d 535, 545, 919 P.2d 69 (1996)). The mandatory nature of such corrections make them necessities of a case that should be reviewed under RAP 4.2(a) despite the absence of a cross appeal. ***State v.***

[2] The record reflects a fine of $2,095.50. This was either a scrivener's error or the court misspoke. Either way, the error was harmless because the court imposed the proper fine according to the DUI sentencing grid. 8-22-16 RP 24.

Sims, 171 Wn.2d 436, 444-45, 256 P.3d 285 (2011); ***In re Pers. Restraint of Moore***, 116 Wn.2d 30, 38-39, 803 P.2d 300 (1991).

A court may impose a penalty assessment of up to $500 for each case or cause of action, including one or more convictions of a felony or gross misdemeanor, against any person found guilty in the superior court of having committed a crime. RCW 7.68.035(1)(a). "Upon conviction or plea of guilty... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars." RCW 36.18.020(2)(h). A court exceeds its statutory authority when it orders an offender to pay fines beyond what the legislature has authorized. RCW 9.9A.760.

The court duplicated the fines imposed for count II (DUI) in the judgments for counts III and IV (Ignition Interlock and DWLS 3), yet all three counts were filed under the same cause number. CP 30-34; 21-29. Since the statute only allows for one $500 penalty assessment and one $200 court cost fee per case or cause of action, the court exceeded its authority when it imposed duplicative fines on counts III and IV. RCW 7.68.035(1)(a); RCW 36.18.020(2)(h). That error was not corrected when the court ran those LFOs "concurrent to Count II" because a court cannot run concurrent a term of sentence it lacks authority to impose. CP 30-34.

It appears that the trial court did not intend to impose fines on either counts III or IV. The record states: "[w]ith respect to the driving while suspended, 90 days concurrent, no additional fines, no additional fines of the ignition interlock." 8-22-16 RP 24. Because the court did not intend to

impose fines on those counts but nevertheless entered them in the judgment, this court should remand for correction of the judgment for counts III and IV.

The same error appears in the judgment for counts I and V (Failure to Obey Officer and Reckless driving) entered September 20, 2016, where, again, a $500 penalty assessment was imposed. CP 46-47. Defendant did not assign error to this judgment; however, review of this facial invalidity is proper under RAP 4.2. *See* ***Sims***, 171 Wn.2d at 444-45. Correcting the facial invalidity in the September judgment now will likely conserve judicial resources in the future.

D. CONCLUSION.

The State respectfully requests this Court affirm the judgment for count II (DUI) entered on August 22, 2016, because it is facially valid, and there are consequently no grounds to vacate it. As it appears the trial court exceeded its authority by imposing duplicative fees in the judgment for counts III and IV (Ignition Interlock and DWLS 3) dated August 22, 2016, and for counts I and V (Failure to Obey an Officer and Reckless Driving)

dated September 20, 2016, the State respectfully requests they be remanded for correction.

DATED: July 10, 2017

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/11/17
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

July 11, 2017 - 1:40 PM

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